Supreme Court, U. S.
FILED
FEB 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON

SLADE GORTON,
Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General

Temple of Justice,
Olympia, Washington 98504
Telephone: (206) 753-5318

February, 1976

STATE PRINTING PLANT ◆ OLYMPIA, WASHINGTON

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON

SLADE GORTON,
Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General

Temple of Justice,
Olympia, Washington 98504
Telephone: (206) 753-5318

February, 1976

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
ARGUMENT	7
CONCLUSION	14

TABLE OF AUTHORITIES

Cases Cited

Bilger v. State, 63 Wash. 457, 116 P. 19 (1911) 2
Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) 2, 6, 7, 11, 12, 13, 14
Borax Ltd. v. Los Angeles, 296 U.S. 10 (1935) 9
Bert L. Cole v. Port of Woodland, U.S.D.C., W.D., Civil No. C75-140T, filed July 15, 1975 6
Coyle v. Smith, 221 U.S. 559 (1911) 8
DeLamar's Nevada Gold Mining Co. v. Nesbitt, 177 U.S. 523 (1900) 12
Ghione v. State, 26 Wn.2d 635, 175 P.2d 955 (1946) 2
Hughes v. Washington, 389 U.S. 290 (1967) 9
Illinois Central Ry. Co. v. Illinois, 146 U.S. 337 (1892) 8
Joy v. St. Louis, 201 U.S. 332 (1906) 10
Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949) .. 6
Marine Ry. & Coal Co. v. United States, 257 U.S. 47 (1921) 11
Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) 8
Newell v. Loeb, 77 Wash. 182, 137 Pac. 811 (1913) 11
Oregon v. Port of St. Helens, Ninth Circuit Court of Appeals, Docket No. 75-3525, Filed February 9, 1976 ... 6
Packer v. Bird, 137 U.S. 661 (1891) 3, 9
Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845) 8
Port of Seattle v. Oregon & Washington Ry. Co., 255 U.S. 56 (1921) 11, 13
Puget Mill Co. v. State, 93 Wash. 128, 160 P.2d 310 (1916) .. 13
Puget Sound Traction, Light & Power Co. v. Newell, 246 U.S. 649 (1917) 11
St. Anthony Falls Water Power Co. v. St. Paul Water Comm., 168 U.S. 349 (1897) 11
St. Louis v. Rutz, 138 U.S. 226 (1891) 10
Shively v. Bowlby, 152 U.S. 1 (1894) 8
State v. Corvallis Sand & Gravel Co., (Ore. App.) 526 P.2d 469 (1974); Aff'd 536 P.2d 517 (1975); reh. den 538 P.2d 70 (1975) 1, 2, 3, 7
United States v. Texas, 339 U.S. 707 (1950) 13

TABLE OF AUTHORITIES—Cont'd
STATUTES

	Page
*RCW 43.30.150(2)	4
RCW 79.68.080	5

OTHER AUTHORITIES

Constitution of the State of Washington Art. XVII, Sect. 1	3
Hopp, Federal Accretion Law, 50 Wash. L. Rev. 777 (1975)	10
Nelson v. State, Cowlitz County Superior Court No. 41072, filed November 3, 1975	6
Office of the Commissioner of Public Lands	5
1969-1970 Biennial Report, Department of Natural Resources	4
Weyerhaeuser Co. v. State, Cowlitz County Superior Court No. 41383, filed December 30, 1975	6
*Revised Code of Washington cited as RCW	

*Revised Code of Washington cited as RCW

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON

STATEMENT OF INTEREST

The Court granted petitions for certiorari on two questions presented for review on January 12, 1976.[1] This brief is directed to the first question posed by the State of Oregon:

> "In a typical situation of a navigable river flowing through two channels, where the smaller of the two channels after 20 years of erosive flooding 'suddenly' becomes the main channel, and the other channel eventually becomes unusable,

[1]The opinions of the state courts are *State v. Corvallis Sand & Gravel Co.*, (Ore. App.) 526 P.2d 469 (1974); Aff'd. 536 P.2d 517 (1975); reh.den. 538 P.2d 70 (1975). Reference in this brief will be to the Oregon Court of Appeals decision (526 P.2d 469).

does federal law deprive the public of title to the beds of both channels?"[2]

The question, as phrased by Oregon, suggests that it has already been deprived of title to the bed of the "unusable" or abandoned channel. Washington disagrees with the implication that Oregon has somehow lost title to the abandoned bed of the Willamette River by application of the rationale of *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).[3] The primary thrust of our disagreement with the question posed cuts deeper than the local law interpretative problem of the abandoned riverbed.

The equal footing doctrine encompasses both proprietary and state interests. Washington submits that the *Bonelli* doctrine should be critically re-examined in light of its potentially severe impact upon aquatic and shore land titles in the Western States. Exceedingly grave propositions are advanced by the court below which, if left undiluted, emasculate the "core" of the equal footing doctrine and cast a pall upon long recognized spheres of state law dominance.[4] The notion that a state's title is depen-

[2]Washington will file a separate brief *amicus curiae* on the second question presented for review at a later date in accordance with the briefing schedule set by the Clerk.

[3]The issue of title to the abandoned bed of the river apparently was not litigated in the Oregon Court. See: 526 P.2d 469, 472-473 and ft.nt. 1. At any event, it was not decided by the court below. Under Washington law, the state owns the abandoned bed of a navigable river where a federal project designed to lower Lake Washington caused the river to dry up. *Ghione v. State*, 26 Wn.2d 635, 651, 175 P.2d 955 (1946); *Bilger v. State*, 63 Wash. 457, 116 P. 19 (1911).

[4]Our concern is illustrated by the lower court's declaration that the extent of a state's title to the beds and shores of navigable waters is to be determined ad hoc based upon loosely formulated equitable considerations.

"* * * So the sovereignty principle alone will not support title of the state in these parcels. Thus we must turn to *Bonelli* and other federal cases to determine *whether title to the bed passed to the state under the facts presented* in the case at bar." 526 P.2d at 476. (Emphasis supplied)

dent upon evidentiary proof of "need" under a strictured concept of "navigational purpose" plays havoc with the constitution, statutes, judicial decisions and management programs of long standing of the State of Washington.[5]

Washington's geographical configuration in its land mass relation to navigable waters, i.e., the Columbia River, Puget Sound and adjacent navigable river systems flowing from the Cascades, coastal waters and adjacent navigable river systems flowing from the Coastal Range, make the dimensions of *Bonelli*'s possible application breathtaking.

Under the express terms of its Enabling Act,[6] the Territory of Washington was guaranteed by Congress that, should it meet the conditions imposed and be admitted into the Union, thereupon it "shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation."[7] Upon its admission into the Union on November 11, 1889, Washington acquired title to a large amount of aquatic real estate.[8] Washington acquired title to the beds of navigable waters to their high water mark[9] as a part of the political decision to convert it from a territory into a state.

[5]526 P.2d 469 at 477.

[6]25 Stat. 676.

[7]Id., Sect. 7.

[8]Constitution of the State of Washington, Art. XVII, Sect. 1.

[9]*Packer v. Bird*, 137 U.S. 661, 671-672 (1891).

It is beyond the scope of this statement of interest to specifically identify the progression of Washington's treatment of aquatic lands lying below the high water mark of navigable waters since statehood.

A brief description of present state management programs and policies regarding state owned marine, aquatic and exposed riparian lands will serve to delineate the potential impact of *Bonelli* upon Washington.

The Washington Department of Natural Resources, Marine Lands Division, has been described in a report to the state legislature:

> "Among the primary responsibilities of this Department (of Natural Resources) are those activities affecting approximately 1,300 miles of state-owned tidelands, some 3,500 miles of state-owned shore lands along navigable rivers and lakes, 6,700 acres of harbor area and between 1,500 and 2,000 square miles of beds of navigable waters.
> * * *
> "The income from the Department's water area program totaled *$1,492,398.00."[10]

Income generated from state lands is not the *sine qua non*. Detailed management policies for these lands have been adopted by the Marine Lands Division of the Department of Natural Resources and approved by the State Board of Natural Resources.[11]

[10]1969-1970 Biennial Report, Department of Natural Resources at page 46. (*The dollar figure is for the biennium.) The Department's 1973 Annual Report at page 37 states that income from this program was approximately $800,000 for that year.

[11]The Board of Natural Resources establishes management policies for the Department of Natural Resources. RCW 43.30.150(2). The

> "The management plan for marine lands includes policies and guidelines for:
> 1. Navigation and commerce
> 2. Public use
> 3. Food, mineral and chemical production
> 4. Protection of the natural marine environment
> 5. Uses by abutting upland owners, and
> 6. Revenue production.
> "The policy statements and guidelines apply to all Department of Natural Resources managed tidelands, harbor areas and beds of navigable waters. They are the primary basis on which the Department's multiple use management plan and programs are developed. These policies apply only to Department of Natural Resources lands and not other government agencies that administer programs on marine lands."

Since statehood, there have been 25,021 sales of state owned tide and shore lands in Washington.[12] As of January 1, 1976, there are 1,498 active leases on state owned aquatic lands for such variegated purposes as recreational docks and wharves, log booming, sewer outfalls, mining, mineral prospecting, dredge disposal sites, state and municipal parks, public fishing, shellfish harvesting, oil and gas exploration and harbor area commercial activities.[13]

Questions will undoubtedly be raised concerning the validity of Washington's title, or that of its grantees, where shoreline movement occurs natur-

text of the policies is found in Appendix A to this brief. The policies are mandated by state law. RCW 79.68.080.

[12]Records of Tideland and Shoreland Deeds, Office of the Commissioner of Public Lands, Olympia, Washington.

[13]Records of Active Aquatic Land Leases, Office of the Commissioner of Public Lands, Olympia, Washington.

ally or with the aid of man.[14] Intertwined with this concern is the fact that Washington's prerogative, as a state, to continue to apply its established real property law to aquatic lands is challenged by *Bonelli, supra.* See argument, *infra,* at pp. 7-14.

The Court's perception of a federal question sufficient to invoke jurisdiction and the view that reference to "federal common law" whose contours are not clearly visible compels Washington, as *amicus curiae,* to submit that *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973) be modified. The admonition of Justice Frankfurter is apropos to our position.[15]

> "Case-by-case adjudication gives to the judicial process the impact of actuality and thereby saves it from the hazards of generalizations insufficiently nourished by experience. There is, however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particular circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of ad hoc determinations making for eventual confusion and conflict. There comes a time when the general considerations underlying each specific situation must be exposed in order to bring the too unruly instances into

[14]Several suits have already been commenced which reach the issues generated by Bonelli. *Nelson v. State,* Cowlitz County Superior Court No. 41072: *Weyerhaeuser Co. v. State,* Cowlitz County Superior Court No. 41383; *Bert L. Cole v. Port of Woodland,* U.S.D.C., Western District of Washington, Civil No. C75-140T; *Oregon v. Port of St. Helens,* Docket No. 75-3525, Ninth Circuit Court of Appeals.

[15]*Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 705 (1949) (Dissenting Opinion)

> more fruitful harmony. The case before us presents one of those problems for the rational solution of which it becomes necessary, as a matter of judicial self-respect, to take soundings in order to know where we are and whither we are going."

ARGUMENT

We perceive the issue to be whether a federal question is presented upon the facts of this case. None of the parcels of land in dispute raise a question regarding the boundary or original extent of the federal grant.[16] The paramount question involves the desirability of accepting the invitation of *Bonelli* to fashion federal common law to resolve disputes arising from rights, interests or title to lands where title ultimately derives from the federal government. Washington submits that *Bonelli* should be restricted in application to its peculiar facts[17] and state law (in this case, Oregon's) should be held to govern the dispute. The decision of the court below should be reversed and the case remanded for adjudication under state law.[18]

[16]Parcels 2A, 2B and 2C comprise lands below the ordinary high water mark of the river as it presently exists. (526 P.2d at 474) Parcel 1 comprises land between the ordinary low water mark and Corvallis' upland ownership boundary. The land was formed by accretion (526 P.2d at 478-479). Parcel 3 comprises land lying within the boundary of Corvallis' description but which is presently the bed of the navigable river due to an avulsive change in 1909. (526 P.2d at 473, 479) Parcels 5, 6 and 7 comprise lands between the line of ordinary high and ordinary low water along the river as it presently exists. Corvallis contends it acquired title under patents issued *under Oregon law.* (526 P.2d at 480)

[17]The result of *Bonelli* can be justified on the basis of the doctrine of reemergence. 414 U.S. at 330, ft.nt. 27.

[18]It is beyond the scope of our argument to suggest *how* Oregon should resolve these local issues upon remand. We express no view on that question.

Explication of the constitutional standard heretofore adopted by the Court necessitates reference to the building blocks of such a formulation. Under a long line of decisions of the Court, title to tidelands and the beds of navigable waters was transferred to a state upon its admission to the Union. This is so by virtue of a state's constitutional right to stand on an equal footing with the original 13 colonies which formed the Union.

Since the original states succeeded to the beds of navigable waters previously held by the English Crown, the Court has held that states subsequently admitted to the Union absorbed a like title. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410, 418 (1842); *Pollard v. Hagen*, 41 U.S. (3 How.) 212, 223 (1845); *Shively v. Bowlby*, 152 U.S. 1, 49 (1894). The Court has referred to this condition of equality as if it were in inherent attribute of membership in the Federal Union. *Illinois Central Ry. Co. v. Illinois*, 146 U.S. 387, 434 (1892). The Court has held that Congress does not possess the power to withhold from subsequently admitted states any facet of sovereignty held by the original states. *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

A state's title to the beds of navigable waters derives from the equal footing doctrine. *Pollard v. Hagen*, *supra*. Which lands are and which lands are not transferred to the newly created states is necessarily a federal question. The federal law becomes the yardstick by which the quantum of initial title

and the boundaries wherein it is fixed is measured. In *Borax Ltd. v. Los Angeles*, 296 U.S. 10 (1935), the Court concluded that the boundary between a grantee of a state's tideland and a federal patentee of the adjacent upland was the line of mean high tide. The Court said (296 U.S. at 22):

> "Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves ascertainment of the essential basis of a right asserted under federal law. *Packer v. Bird*, 137 U.S. 661, 669, 670; *Brewer-Elliott Oil Co. v. United States*, 260 U.S. 77, 87; *United States v. Holt Bank*, 270 U.S. 49, 55, 56; *United States v. Utah*, 283 U.S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law, *Barney v. Keokuk*, 94 U.S. 324, 338; *Shively v. Bowlby*, *supra*, p. 40; *Hardin v. Jordan*, 140 U.S. 371, 382; *Port of Seattle v. Oregon & Washington R. Co.*, 255 U.S. 56, 73."[19]

The Court has recognized this rule and deferred

[19] *Hughes v. Washington*, 389 U.S. 290, 294 (1967) at ft. nt. 3 preserves the federal question distinction between establishment of boundaries of a federal grant and a state's entitlement to devise its own rules applicable to lands over which it had already acquired title. *Hughes* is not opposite to the views expressed herein.

to state law. In *St. Louis v. Rutz*, 138 U.S. 226, 242 (1891), the Court said:

> "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the waters edge, is a question in regard to a rule of property, which is governed by local law. (Citing cases)"

The parameters of the rule of deference to state law were further defined in *Joy v. St. Louis*, 201 U.S. 332, 342, 343 (1906):

> "In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land formed by accretion, which has taken place many years since the patent was issued and since the acts of Congress were passed.
> • • •
> "As the land in controversy is not the land described in the letters patent or the acts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States."[20]

In the case at bar, Corvallis contends that parcel 1 of the disputed lands was formed by accretion.[21] Corvallis does not claim title to any of the parcels in

[20] In *Hopp, Federal Accretion Law*, 50 Wash. L. Rev. 777, 787, (1975), the author comments on *Bonelli's* apparent abandonment of this rule:

"Under *Joy*, a federal court's role is limited to determining the boundary at the time of the grant and before statehood. By holding that the Court has jurisdiction to decide the effects of post-patent movements of the river on the boundaries of federally granted land because the federal government is the source of title, the *Bonelli* Court has impliedly overruled *Joy* and created a new federal question of doubtful validity."

[21] 526 P.2d at 478.

question based on the boundaries of the original federal patent. Its claim is predicated upon post-statehood movement of the Willamette River. A federal question is not presented if the Court adheres to the enunciated principle."[22]

The efficacy of the original federal grant itself is not impaired by holding that state law controls the rights and interests in such lands. *St. Anthony Falls Water Power Co. v. St. Paul Water Comm.*, 168 U.S. 349, 363 (1897). This rule has been applied to cases arising from Washington. The Court, per curiam, dismissed an appeal for want of a federal question upon the principle that state law had resolved the controversy. *Puget Sound Traction, Light & Power Co. v. Newell*, 246 U.S. 649 (1917). The Washington Supreme Court in that case had ruled, under state law, that petitioner's title as an upland owner did not extend into the bed of a navigable river even though the state had, itself, diverted its flow. *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811 (1913).[23]

In sum, the idea of measuring post-statehood river movements by reference to the federal common law[24] is at variance with a long line of decisions of

[22] A decision where the Court held that the United States retained title to a land fill placed on the bed of the Potomac River in the District of Columbia is *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47 (1921). The United States argued successfully the proprietary right of the state of Maryland to the bed as reclaimed by artificial means. 257 U.S. at 60.

[23] Another Washington case reaching the Court likewise applied this principle. *Port of Seattle v. Oregon & Washington Ry. Co.*, 255 U.S. 56, 63 (1921) states:

"Whether a conveyance made by the State of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same, is a matter wholly of local law."

[24] *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 319-321 (1973).

the Court. It is likewise at variance with the rationale for the principle of deference to state law as stated by the Court in *DeLamar's Nevada Gold Mining Co. v. Nesbitt*, 177 U.S. 523, 527 (1900):

> "If the law were otherwise, then every land case wherein one of the parties claimed title, either immediately or remotely through a patent of the United States, would present a Federal question; and as most of the land titles in the Western States of this country are traceable back to a right under the laws of the United States, every such case might be held reviewable by this court on writ of error. This position is, of course, untenable."[25]

By way of contrast, *Bonelli* holds that the fact that a state's claim to title to the bed of a navigable stream is based on the equal footing doctrine "required the invocation of federal law to resolve the instant dispute." *Bonelli Cattle Co. v. Arizona*, *supra*, 414 U.S. at 330, ft. nt. 27. This is a direct contradiction of both the theory and purpose of the equal footing doctrine. The equal footing doctrine confirms a state's proprietary interest in submerged lands at the time of its admission. It also preserves a state's sovereign prerogative to apply its laws to such lands subject to the overriding federal navigational servitude. *Bonelli* destroys the very rule it purports

[25]The original 13 states and the State of Texas do not derive their title from the federal government. Those states are free to devise and apply their own rules regarding claims to lands exposed or submerged by river movement under the *Bonelli* doctrine. 414 U.S. at 336 (Stewart. J., dissenting) The result is, of course, contrary to the equal footing doctrine. See: 50 Wash. L. Rev. 777 at 790-792, Note 19, *supra*, where the point is made that every federal project involving a navigable waterway may work a transfer of title if *Bonelli*'s doctrine is extended.

to invoke in support of a new federal test of state ownership. State law governing title to beds of navigable waters is thus replaced by federal law contrary to the constitutional imperative.

The Court has carefully explained the three mile ocean exception to the equal footing doctrine by reference to the core principle in *United States v. Texas*, 339 U.S. 707, 719-720 (1950):

> "The 'equal footing' clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty (*Pollard's Lessee v. Hagen*, *supra*) which would produce inequality among the States. For equality of States means that they are not 'less or greater, or different in dignity or power.' See *Coyle v. Smith*, 221 U.S. 559, 566. There is no need to take evidence to establish the meaning of 'equal footing.'"

We see no escape from the conclusion that *Bonelli Cattle Co. v. Arizona*, *supra*, represents an impermissible intrusion into long settled and established constitutional principles which recognize the efficacy of state property law.[26] Neither do we see the need to further slice the remaining core of the equal footing doctrine. *United States v. Texas*, *supra*. The alleged "windfall" to a state (*Bonelli*, p. 328) amounts to nothing more than a confirmation of preexistent title by application of settled local law.

[26]Washington's law early on has developed and been applied regarding title to the beds of navigable waters. In 1916 the state Supreme Court noted that the state's grant of title to tide lands is not questionable. *Puget Mill Co. v. State*, 93 Wash. 128, 134-135, 160 P.2d 310 (1916). See also: *Port of Seattle v. Oregon & Washington Ry. Co.*, 255 U.S. 56, 65 (1921).

CONCLUSION

In the instant case, the 1909 rechannelization of the Willamette River was found by the court below to be an avulsive change. The question presented regarding ownership of the present bed of the river should be resolved under Oregon law. A federal question is not presented in a case such as this where no issue is raised concerning the nature or extent of a federal grant. Natural or artificial shoreline movements often raise questions of title which have, under the equal footing doctrine, been historically resolved by application of state law. To the extent that *Bonelli Cattle Co. v. Arizona*, *supra*, is without a sound constitutional foundation, it should be abandoned.

For these reasons, the judgment of the Supreme Court of Oregon should be reversed and it should be directed to apply the law of its jurisdiction to resolve this title dispute.

Respectfully submitted,

SLADE GORTON,
Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General
Temple of Justice,
Attorneys for Amicus Curiae
State of Washington

February, 1976

APPENDIX A

The Washington Board of Natural Resources by Resolution No. 165 dated April 3, 1973 adopted the following revised policies for management of state owned marine lands.

POLICY 1: Navigation and Commerce

To provide for navigation and commerce on tidelands, harbor areas and beds of navigable waters. Guidelines:

1. Priority consideration shall be given to meeting the expanding need for navigation and commerce on first class tidelands and existing harbor areas.
2. Prior to establishing new harbor areas for deep draft commerce, an up-to-date comprehensive study of national dependence on Washington State to provide for commerce must be completed and a statewide harbor development plan based on national and state needs must be developed.
3. Harbor lines will be adjusted, when justified, to provide reasonable opportunity to meet the future needs of commerce.
4. Water dependent uses of the tidelands, harbor areas and beds of navigable waters shall be given preference over other uses.
5. Several industries using the same harbor area facility shall be given preference over single industry use.
6. Harbor areas will be reserved for landings, wharves, streets and other conveniences to navigation, commerce, however, where no current constitu-

tional use is practical and other public uses are in demand, interim public use may be authorized.

7. Provisions will be made to minimize interference with surface navigation even though other uses have been allocated.

8. Development of additional sites for navigation and commerce will not generally be authorized on second class tidelands if existing first class tidelands can meet the need.

9. Development, such as floating piers and breakwaters, will be encouraged so as to provide alternatives for increasing capacity for waterborne commerce without imposing environmental costs of establishing new harbor areas and their associated dredging and maintenance.

10. Shallow draft uses, such as barge terminals and marinas, will be preferred over deep draft uses in areas requiring extensive maintenance dredging.

11. Anchorages and harbors of refuge may be allocated to provide protection and moorage space for watercraft.

12. To provide for public safety, comprehensive mooring buoy locations, lighting and marking plans and programs will be implemented.

POLICY 2: Public Use

To provide for the protection and improvement of marine lands for public use.

Guidelines:

1. Selected second class tideland tracts of 1,000 contiguous feet or more or smaller areas of special recre-

ational quality, which have not been withdrawn for governmental or aquacultural uses, will be managed for public use.

2. Whenever practical, leases of first class tideland will provide for public access to the water.

3. Areas of second class tidelands, designed for public use, will be identified as public use beaches, properly advertised and marked and will be maintained on a regular basis for public use.

4. Areas allocated for public use will not be managed to produce a profit for a concessionaire or the administering agency without a lease fee being charged.

5. Where the State owns the abutting uplands, priority will be given to joint development of the uplands and second class tidelands for public use.

6. Selected second class tidelands will be set aside for development of self-guiding marine nature walks.

7. Selected second class tidelands capable of clam or oyster production, except those designated for aquacultural uses, will be set aside for public use.

8. Provisions shall be made to insure that traditional sports fishing areas are protected from competing uses that create obstructions.

9. Notice will be served to the current lessees of tidelands allocated for future public use, that prior to renewal of current leases, such leases will be modified to permit public use or will be terminated.

10. Bedlands abutting upland parks shall be considered for underwater parks.

11. Motorized vehicular travel will not be permitted on Department of Natural Resources' managed public use tidelands.

12. In recognition of the increasing impact on the recreating public on the State's beaches, new programs will be devoted to public education about stewardship of State marine resources.

POLICY 3: Food, Mineral & Chemical Production

To provide for the production of food, minerals and chemicals on marine lands with preference given to renewable resource activities.

Guidelines:

1. Tidelands and beds of navigable waters, especially valuable for aquaculture, will be so designated and protected from conflicting uses which would limit their utility for this purpose.

2. Information shall be provided to encourage commercial aquacultural activity to expand into proper locations.

3. Provisions shall be made to insure that traditional commercial fishing areas are protected from competing uses that create obstructions.

4. Certain lands will be selected for habitat improvement where such environments can be improved by adding structures, materials and plants.

5. Whenever structures are used for aquaculture on the beds of navigable waters, they shall be located in such a way as to minimize the interference with navigation and fishing and minimize visual impacts.

6. Marine lands will be inventoried as to the location

of significant deposits of minerals and aggregates, and a determination made as to the significance and dependence of the State on such deposits.

POLICY 4: Protection of the Natural Marine Environment

To protect and enhance the quality of the natural marine environment.

Guidelines:

1. Provisions for leasing tidelands and beds shall include requirements for protecting the natural marine environment.

2. Areas of special educational or scientific interest or areas of special environmental importance may be withdrawn as reserves and protected from competing uses.

3. Provisions shall be made to insure that structures on Department of Natural Resources managed land are properly maintained.

4. Unsightly abandoned structures shall be removed from Department of Natural Resources marine lands as funds permit.

5. Long term commitments will be avoided when leasing for water dependent uses which are essential to the economy and public welfare, but have adverse environmental impacts. Leases and permits will not be issued for non-water dependent uses which have significant environmental impacts.

6. Easements or leases for the development of underwater pipelines and cables will not be granted except where adverse environmental impacts can be shown

to be less than the impact of upland alternative, and when granted will include proper provisions to insure against substantial or irrevocable damage to the environment.

7. Structures and uses on marine lands will be designed to provide for safe passage of migrating animals whose life cycle is dependent on such migration.

8. The use of floating breakwaters shall be encouraged as protective structures rather than using permanent earth and rock fills.

9. Second class tidelands will generally be maintained free of bulkheads.

10. Beach material from tidelands and beds will generally not be used to backfill bulkheads and seawalls.

11. Filling on second class tideland will generally not be permitted.

12. When material from tidelands and beds is permitted as backfill and when filling on second class tidelands is permitted, provisions to stabilize fill material will be required.

13. Spoil disposal sites will be provided on the beds of navigable waters for certain materials that are approved for such disposal by regulatory agencies.

POLICY 5: Uses by Abutting Upland Owners

To provide certain tidelands and bedlands for use by abutting upland owners and to consider certain riparian interests in the management of marine lands.

Guidelines:

1. When tidelands are leased to someone other than the abutting upland owner, such leases will provide for the abutting owner to reach the beds of navigable waters.

2. Second class tidelands not allocated for public use may be made available for lease to the abutting upland owner without providing for public use.

3. In those cases where tidelands are managed for public use, the rights of private upland owners abutting public use tidelands will be recognized by suitable marking of the intervening property lines and properly posting the tidal tract.

4. Anchorage areas on the beds of navigable waters shall be designated for use by upland owners for mooring boats.

5. To reduce the burden on marinas, private mooring buoys and floats associated with shoreline residences will be encouraged.

6. Where there is no interference with normal routes of navigation for watercraft, swim floats and mooring buoys will be authorized on tidelands and bedlands shoreward of the 3 fatham contour or within 500 feet of mean high tide, whichever is appropriate. The placement of floats and buoys beyond the 3 fathom contour or 500 feet will be evaluated on a case by case basis.

POLICY 6: Revenue Production

To manage the marine lands under a pricing system which will compensate the public for reduction in

the availability of the public lands due to private use and thereby produce revenue to reduce the general tax burden.

Guidelines:

1. The value of Department of Natural Resources managed tidelands and beds of navigable waters to the general public will be recognized by charging competing lessees the full market price for the land.
2. Lease rates may be reduced depending on the degree to which the use interferes with the public use of the same property. Total withdrawal for private use requires a full rental payment.
3. When the effects or marine uses have an identifiable adverse impact on Department of Natural Resources land, a value will be placed on the loss or impact and charged to the user.
4. Available revenue from leasing of marine lands shall be used for marine land management programs that are of direct benefit to the public.
5. First class tidelands and harbor areas, unless withdrawn by the Commissioner of Public Lands as recreational use property, will be managed to produce revenue and service to the public.
6. Lease rates may be reduced for up to five years as an incentive when lessees are involved in research or development work which is in the public interest.